Nos. 22,188 and 22,188-A

United States Court of Appeals

For the Ninth Circuit

BEVERLY J. McCONNELL, *Appellant*, vs. ESTATE OF BUTLER, *Appellee*, and OSCAR STROBLE, Trustee, *Appellant*, vs. ESTATE OF BUTLER, *Appellee*.	No. 22,188 No. 22,188-A

On Appeal from the United States District Court for the District of Arizona

APPELLANT'S OPENING BRIEF

STOCKTON & HING,
By HENDERSON STOCKTON,
507 Security Building,
Phoenix, Arizona 85004,
Attorneys for Appellant Beverly J. McConnell.

FILED
DEC 8 1967
WM. B LUCK CLERK

DEC 14 1967

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

Nos. 22,188 and 22,188-A

United States Court of Appeals
For the Ninth Circuit

BEVERLY J. McCONNELL, *Appellant,* vs. ESTATE OF BUTLER, *Appellee,*	No. 22,188
and OSCAR STROBLE, Trustee, *Appellant,* vs. ESTATE OF BUTLER, *Appellee.*	No. 22,188-A

On Appeal from the United States District Court for the District of Arizona

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal by an attorney for a bankruptcy trustee from an Order of a bankruptcy Referee—as affirmed by a District Court—setting her fee for legal services rendered to the trustee in the course of administering a bankruptcy estate.

The Referee's jurisdiction to set the fee rests on § 38(6), 11 U.S.C. § 66, of the Bankruptcy Act.

The District Court's jurisdiction to review the Order of the Referee rests on § 39c, 11 U.S.C. § 67, of the Bankruptcy Act.

This Court's jurisdiction rests on §24a, 11 U.S.C. §47, of the Bankruptcy Act.

STATEMENT OF THE CASE

On October 4, 1966, after her appointment as counsel for the bankruptcy trustee on August 5, 1963, Appellant was awarded a fee of $8,000.00 (A.R. 112). Appellant's requested fee was $30,000.00 (R.T. 42-45). The total estate of the bankrupt when reduced to money by the trustee amounted to approximately $254,153.51, consisting of: $49,313.84 turned over to the trustee by the receiver; $88,000.00 from the sale of the merchandise inventory, furniture and fixtures, and name; accounts receivable collected by forwarders outside the State of Arizona, $26,600.27; accounts receivable collected in Arizona, $59,638.85; and 4% interest from depository bank on estate funds deposited as of September 30, 1967, $30,600.55.

The trustee of bankrupt was appointed and qualified on the 5th day of August, 1963 (A.R. 26).

Upon the trustee's qualification, he received from the receiver, in money, $49,313.84; all the physical assets of bankrupt that had come into the hands of

the receiver, consisting of merchandise, furniture and fixtures; and accounts receivable.

The trustee conducted the business of the bankrupt from August 5, 1963, until August 22, 1963, on which date the merchandise and name were sold by the trustee for $88,000.00 and the furniture and fixtures were sold for $4,000.00.

In the schedules of bankrupt, its merchandise inventory was shown as being of the value of $35,500.00. It was appraised by court-appointed appraisers as being of the value of $72,042.00. The trustee sold same for $87,000.00.

The furniture and equipment were scheduled by bankrupt as being of the value of $1,650.00 and appraised by court-appointed appraisers as being of the value of $4,320.00. They were sold by the trustee for $4,000.00.

The name of bankrupt was not scheduled as an asset, nor was it appraised as having any value by the court-appointed appraisers, but the name was sold to the purchaser of the merchandise inventory for $1,000.00.

The bankrupt scheduled its accounts receivable as being of the face value of $288,752.93 and valued the same at $50,000.00. The receiver, prior to August 5, 1963, collected, of the accounts receivable of the face value of $288,752.93, the sum of $21,356.50. The face value of accounts receivable coming into the hands of the trustee was $267,396.43. Concerning these ac-

counts receivable, the Referee said, on page 5 of his Certificate on Petition for Review, that:

> "The debtors petition classified and divided the accounts receivables into four groups. Group I, with a total amount outstanding of $31,500 with 75% of these current. Group II, were those accounts receivables on open or extended terms with a total outstanding of $95,000 with 75% of this group being current. The other two groups of accounts receivables were classified as doubtful or uncollectable. The total of these two groups was $162,000 . . ."

There was a bid made at the first meeting of creditors to purchase the accounts receivable for $29,500.00. The Referee in charge of the proceedings was disposed to approve a sale of all of the accounts receivable for this offer of $29,500.00. Appellant, as attorney for the trustee, so vigorously opposed a sale of the accounts receivable (aided by the creditors' committee and others) that the Referee reluctantly authorized the trustee to collect the accounts receivable, rather than confirm a sale of same.

Appellant's law firm, Wilson & McConnell, for a period of a great many years next last past, has maintained an efficient and effective collection agency as a part of its law officers.

Appellant forwarded to out-of-state attorneys and collection agencies selected accounts receivable for collection. From the efforts of such attorneys and collection agencies, including the prosecution of seven suits in the courts, a gross sum of $26,600.27 was

collected. These attorneys and collection agencies charged and deducted from the monies collected, for their fees and commissions, $5,107.36; and the out-of-state collections thus netted the estate $21,492.91. The Referee approved the fees and commissions charged by out-of-state attorneys and collection agencies and the deduction of their fees and commissions from the gross collected and the remittance to the trustee of the net remaining of $21,492.91. The fees and commissions of out-of-state attorneys and collection agencies amounted to 19.2% of the gross amount collected.

Appellant, through the facilities of her law office, pursued, diligently and actively, the collection of accounts receivable after August 5, 1963, and by such efforts, including the commencement of eleven suits in the Court, collected $59,638.85.

Appellant was of such stature with the Bank of Douglas in Phoenix that she, alone, arranged for this lawfully-designated and qualified depository bank to pay 4% interest on the funds of the estate deposited into the bank. In this District, it is believed, this was the initial or first time interest was ever paid on funds of a bankruptcy estate deposited into a lawfully-designated and qualified bank depository. The service of Appellant in obtaining interest on funds of the estate deposited in the bank is entitled to real consideration and substantial monetary reward. Interest at 4% on the estate funds received by the trustee as of September 29, 1967, amounted to $30,600.55.

It is obvious that the Referee's findings do not give a reasonable fee based upon the value of legal services in this District, because the Referee found that more than 100 hours had been devoted to the performance of the duties of Appellant as attorney for the trustee.

On November 2, 1966, Appellant filed her Petition for Review of the Order of the Referee of October 4, 1966, which Order of the Referee was based on the Findings of Fact and Conclusions of Law of the said Referee, dated October 4, 1966.

On March 20, 1967, the Referee filed his Certificate on Petition for Review.

On April 5, 1967, Appellant filed her Objections to Referee's Certificate on Review and her Request for Amendments thereto, for the reason that the Referee's Certificate did not comply with the provisions of Section 39(a)8 of the Bankruptcy Act, in that said Certificate did not contain either a transcript of the evidence or a summary thereof, nor did the Referee send up to the District Court the pertinent records pertaining to attorneys' fees.

On April 27, 1967, the United States District Court entered its Order that the Objections to the Certificate of Review were overruled and that the Referee's Findings of Fact and Conclusions of Law and Order for Fees and Allowances were approved; and on June 26, 1967, formal written Judgment to the same effect was entered.

On June 1, 1967, Appellant filed her Notice of Appeal to the United States Court of Appeals for the

Ninth Circuit from the Order of the District Court of April 27, 1967, and on July 3, 1967, filed her Amended Notice of Appeal from the Judgment of the District Court overruling the trustee's Objection to Certificate of Review and sustaining the Referee's Findings of Fact and Conclusions of Law and Order for Fees and Allowances to Beverly J. McConnell, attorney for the trustee.

Appellant's Appeal was timely perfected (R.T. 133 and R.T. 138).

The principal issue before this Court on this Appeal is whether the $8,000.00 fee allowed Appellant was so low under the circumstances as to amount to an abuse of discretion.

SPECIFICATION OF ERRORS

1. The Referee and the District Court erred in awarding the Appellant a fee that is less than fair and reasonable under settled bankruptcy principles.

2. The Referee and the District Court erred in awarding Appellant a fee that did not take into consideration the prevailing fees or commissions for the forwarding of accounts receivable to out-of-state attorneys and collection agencies for collection.

3. The Referee and the District Court erred in awarding the Appellant a fee that did not take into consideration the prevailing fees or commissions for the collection of accounts receivable in the Arizona District.

4. The Referee and the District Court erred in not awarding the Appellant any fee for procuring more than $30,600.55 in interest from the depository Bank of Douglas on the estate funds deposited therein.

5. The fee of $8,000.00 allowed to Appellant was so low under the circumstances as to amount to an abuse of discretion.

6. The Referee and the United States District Court were acting under the same misapprehension of the law in the allowance of the $8,000.00 fee to Appellant as the Referee and the United States District Court acted in their allowance of fee to attorney for trustee considered by this Court in the case of *Jacobowitz v. Double Seven Corporation* decided by this Court on June 5, 1967. 378 F.2d 405.

SUMMARY OF ARGUMENT

1. All authorities agree that an attorney for a bankruptcy trustee is entitled to a fair and reasonable fee for necessary professional services competently rendered.

2. The $8,000.00 fee allowed Appellant, as attorney for trustee, was so low under the circumstances as to amount to an abuse of discretion.

3. The Referee and the United States District Court, in allowing Appellant's fee, did so under a misapprehension of the law.

4. The fee of $8,000.00 allowed Appellant, as attorney for the trustee, was not a reasonable fee based upon a consideration of the judicially-accepted criteria for fee allowance.

5. A reasonable fee on all pertinent bases of allowance under the circumstances of this case was $30,000.00, the amount sought by Appellant.

6. The results of the services of Appellant as attorney for the trustee greatly added to the money amount of the estate.

7. The fee sought ($30,000.00) is objected to by only one creditor, and not by the creditors' committee. The objecting creditor is the Estate of Walter H. Butler, Deceased, and his estate is a creditor by virtue of his relationship with the bankrupt in consequence of which he paid loans made by the Crocker Citizens National Bank (formerly Citizens National Bank) and the United California Bank (formerly California Bank) under guarantees he executed in his liftetime. This creditor belongs to a specialty group and is not one of the ordinary creditors.

ARGUMENT

I. A REASONABLE FEE TO BE PAID AN ATTORNEY FOR A BANKRUPTCY TRUSTEE IS NO DIFFERENT FROM A REASONABLE FEE IN PRIVATE EMPLOYMENT, EXCEPT THAT THE SPIRIT OF THE BANKRUPTCY ACT WOULD SEEM TO REQUIRE A COURT TO FIX SUCH FEE AT THE LOWER END OF THE SPECTRUM OF REASONABLENESS.

This Court, in *Jacobowitz v. Double Seven Corporation,* 378 F.2d 405, decided on June 5, 1967,

rendered a judgment which appears to be decisive in this case, in favor of Appellant.

The Bankruptcy Act itself does not prescribe an objective criterion for determining the quantum of the fee. However, all authorities agree that the fee allowed should be fair and reasonable under the circumstances of the particular case and that such determination is left to the sound judicial discretion of the Bankruptcy Courts. In the case now before the Court, the following elements are to be considered:

(a) The period of time elapsing during which services were rendered (since August 5, 1963);

(b) The time devoted in rendering services (some 200 hours);

(c) The size of the estate.

(d) The responsibility of the attorney, her stature, standing and ability;

(e) Obtaining agreement with the approved depository bank for the payment of interest on the funds of the bankruptcy estate on deposit (interest thus collected, more than $30,600.55);

(f) The facilities for collecting accounts receivable made available by attorney for trustee in the law office maintained by her and her partner and their unusual experience in collecting accounts receivable.

(g) The services of counsel sought and obtained by the trustee in the conduct of the business of bankrupt and the administration of the bankruptcy estate;

(h) The advantage measured in money realized by the estate directly as the result of services rendered to the trustee;

(i) The efforts of the attorney for the trustee in dissuading the Referee from approving sale of all accounts receivable at first meeting of creditors for $29,500.00;

(j) The aid given the trustee by Appellant as attorney in the operation of the business of bankrupt and in selling the business as a going concern for $92,000.00;

(k) The forwarding of selected accounts receivable to out-of-state attorneys and collection agencies and supervising the handling, resulting in the collection of a gross amount of $26,600.27; netting the estate $21,492.91 after the approval of the retention by out-of-state attorneys and collection agencies of $5,107.36 for their fees and commissions.

(l) The fact that the services rendered by the attorney for the trustee were rendered at the command and with the full knowledge and approval of the trustee.

See:

Section 62 of the *Bankruptcy Act* (11 U.S.C.A. § 102); *In Re Owl Drug Co.* (1936), 16 F.Supp. 139 (D.C. Nev); affirmed sub nom; *Cohen v. Elder,* 9 Cir., 90 F.2d 823; *In Re Barceloux* (1935), 9 Cir., 74 F.2d 288; *Sampsell v. Monell* (1947), 9 Cir., 162

F.2d 4; 3 *Collier on Bankruptcy,* 14th Ed., Sec. 62.12 (4) & (5); 6 *Remington on Bankruptcy,* 5th Ed., Sections 2672 & 2673; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C.C. Mo. 1887), 32 F. 187, 188; *Realty Associates Securities Corporation v. O'Connor* (1935), 295 U.S. 295, 299, 55 S.Ct. 663, 79 L.Ed. 1446; *In Re Gilbert* (1928), 276 U.S. 294, 296, 48 S.Ct. 309, 72 L.Ed. 580, 16 F.Supp. 139, 142; *Monaghan v. Hill* (1944), 9 Cir., 140 F.2d 31: Canon 12 of the *Canons of Ethics of the American Bar Association; 7 Am. Jur.* 2d, Attorneys at Law, Secs. 235-247; 56 *A.L.R.* 2d 13, 18-48; *In Re Seed Marketing Association* (1964), 228 F.Supp. 812, 820 (D.C. Neb.); 39 *Referees Journal* 34, April, 1965; 6 *Remington on Bankruptcy,* 5th Ed., Section 2682, pp. 228-229; 3 *Collier on Bankruptcy,* 14th Ed., Sec. 62.12(5), pp. 1488-1489; *In Re Belfort Corp.,* 136 F.Supp. 1, 4-5 (D.C. Mo. 1955); *In Re Standard Gas & Electric Co.* (1939), 3 Cir., 106 F.2d 215, 216-217; *In Re Mt. Forest Fur Farms of America* (1946), 6 Cir., 157 F. 2d 640, 647; and *Finn v. Childs Co.* (1950), 2 Cir., 181 F.2d 431, 435-436.

We agree with what this Court said in the *Jacobowitz* case, supra, and we are so impressed by the statement that, for emphasis, we quote from the opinion, page 408:

> "Admittedly, the economical spirit of the Bankruptcy Act is one of the considerations going into the determination of a reasonable fee in bankruptcy cases, but it is only one consideration to be weighed and valued along with others. There

is, of course, no precise measure for reasonableness. The court in a given case fixes the fee after a consideration of various elements * * *" "* * *"

"Determining reasonable fees in bankruptcy cases is no different from determining them in private employment, except that the spirit of the Bankruptcy Act would seem to require a court to fix such fees at the lower end of the spectrum of reasonableness."

II. THE REFEREE AND THE DISTRICT COURT ACTED UNDER A MISAPPREHENSION OF THE LAW IN THE ALLOWANCE OF A FEE OF ONLY $8,000.00 TO APPELLANT. AN $8,000.00 FEE IS SO LOW UNDER THE CIRCUMSTANCES AS TO AMOUNT TO AN ABUSE OF DISCRETION.

The Referee, in his Certificate on Review, on page 5, stated:

"The petition of the attorney for the receiver/trustee for fees and allowances presented a most difficult question to the Referee."

The allowance of a reasonable fee was "a most difficult question" for the Referee because the Referee, as stated in the *Jacobowitz* case, supra, page 408:

"believed himself compelled by the economical spirit of the Bankruptcy Act to cut to an appreciable degree every request for attorneys' fees, no matter how low they might appear upon the scale of reasonableness when measured by private employment standards."

No doubt, also, the Referee had in mind and considered statistical averages of administrative expenses

incurred in closing cases generally throughout the United States.

May it not be reasonably assumed that the District Judge was likewise influenced by the same considerations that made the question a difficult one for the Referee?

We call attention to the fact that the Referee and the District Judge deciding the *Jacobowitz* case were a different Referee and a different District Judge from the Referee and Judge who decided the instant case. However, it is the same Court, though presided over by a different Referee and a different Judge. Was not the same misapprehension of the law present in the instant case that was present in the *Jacobowitz* case?

The time of Appellant devoted to aiding the trustee in the conduct of the business, the sale of the assets of the business, and to ordinary administrative matters in a case of the size of the estate of bankrupt, considered in the light of the success attained and a good sale and a good administration of the estate, is such that a reasonable fee would surely be more than the fee of $8,000.00 allowed. The minimum fee basis of $35.00 an hour prevailing in this District ought not to be, in this case, the basis of a reasonable allowance, even "at the lower end of the spectrum of reasonableness". This minimum fee, basically, is used by the young, inexperienced and unspecialized lawyers. Such a minimum-fee basis of charge has little application to the experienced, specialized practitioner.

Collections on Selected Claims Forwarded for Collection Outside of Arizona

The sum of $26,600.27 was collected outside of Arizona on claims forwarded out for collection. The charges paid to those collecting the accounts outside of Arizona were 19.2%, or $5,107.36. In an ordinary case of a private business, on claims forwarded by one in the position of Appellant and with collections supervised as Appellant supervised the collections outside of Arizona, the reasonable and usual fee to the forwarding attorney would be one-third of a collection charge of not less than 25% and as much as one-third of the gross amount collected. Since there was retained, with approval of the Court, 19.2% of the gross collections of $26,600.27, a reasonable fee to Appellant for these collections alone would be 9.6%, or $2,553.60.

Accounts Collected in Arizona

Appellant, basically, supervised the collection of accounts receivable through the collection department in her law office. However, in addition, she instituted eleven suits in the Courts. Now, what is a reasonable fee for the collection, in Arizona, of $59,638.85? Twenty-five per cent, by standards applicable to private businesses, would be low. One-third would be the usual, but if we should say 20% as a basis, that would surely be "at the lower end of the spectrum of reasonableness" and Appellant would be entitled to a fee, on the collection of $59,638.85, of $11,927.70. It should be here considered that 65% of this $11,927.70, or $7,753.00, would just pay the out-of-pocket ex-

penses of Appellant for the services of the collection department maintained in her law offices. Collection agencies and collection departments in law offices do not run themselves. They have to be supervised. Among other expenses: There is office rent. There is clerical expense. There is stenographic expense. There is telephone expense. There is expense for stamps and envelopes. It is for all of these expenses that Appellant was out of pocket 65% of whatever fee is deemed to be reasonable for the collection of $59,638.85. It is only 35% of such an amount that would constitute a fee to Appellant. There has been no charge made, paid or sought for these expenses for these collections. On a 20% basis of collection, the out-of-pocket expense of Appellant in making the collections through the collection department in her law office would amount to $7,753.00. Appellant had out-of-pocket expenses only $247.00 less than the total allowed fee of $8,000.00. While it is true the out-of-pocket expense is an estimate of $7,753.00, it is a known fact and certain that the out-of-pocket expense in making the collections by the use of the facilities of the collection department in Appellant's office amounted to a very substantial sum and may well have exceeded $7,753.00.

Four Per Cent Interest on Deposits of Estate Funds

It is evident from the Referee's Certificate on Review that he gave no consideration in fixing the fee of Appellant to her services in arranging with the depository Bank of Douglas for the payment of 4%

interest on deposits which, as of September 30, 1967, has increased the estate of the bankrupt by $30,-600.55. Until this case, the payment of interest by a depository bank on funds of a bankrupt deposited therein was unheard of. Before, everyone's efforts to get interest were totally unsuccessful. Appellant, alone being responsible for the arrangement for the lawfully-designated and qualified depository bank to pay 4% interest on the funds of the estate deposited into the bank, is entitled to great consideration. A substantial fee allowance for this service to the trustee and the estate must be made if she is to be reasonably compensated for her services. The result of this arrangement with the depository bank, alone, has increased the estate of the bankrupt by an amount of money sufficient to pay Appellant the $30,-000.00 fee she seeks.

The Time Element

In Paragraph 10 of the Referee's Findings of Fact (R.T. 92), he makes this finding:

> "A substantial amount of the time and effort of the attorney for the trustee was spent in performing the duties of the trustee in administering the estate."

We can find no justification at all in the record to support this finding.

In fixing the fee of Appellant, it is apparent that the Referee believed a substantial amount of the time and effort of Appellant, as attorney for the trustee, was spent in performing duties of the trustee.

A trustee best knows what services he needs to have performed by his attorney. Appellant, as the trustee's attorney, was in a better position to know that the services she performed were proper services for the trustee to require. The results obtained demonstrate that the trustee should be complimented, rather than censured, for the attorney he selected and for the amount of time and effort put forth by his attorney. Perhaps the trustee, inexperienced as he was, lacked the capabilities and this necessitated his assigning the duties to his attorney.

The Referee appears to believe that a trustee himself is obligated to collect accounts receivable and to devote such of his time and effort thereto as may be necessary. That such is not the duty of a trustee seems clear, because of the limited commissions that may be paid to him. Were a trustee to rent office space, hire clerical employees, incur stenographic expense and telephone expense to collect accounts receivable, this conduct would be frowned upon and in all probability disapproved by any Referee in charge of any bankruptcy estate. Likewise, on a time basis, an attorney for a trustee ought not, herself, to pursue the collection of accounts receivable on a time basis. A trustee and an attorney for a trustee should pursue the methods of collecting accounts receivable that are pursued in the business world. It is the time-honored method of collecting accounts receivable that a commission be paid to the collector; and if no collections, no pay. One could not justify an attorney for the trustee clocking time in efforts to col-

lect accounts receivable and expecting a fee to be fixed on a time basis.

Since the attorney for the trustee, acting in his behalf, followed the established, generally-accepted and approved method of collecting the accounts receivable of the bankrupt, Appellant should be paid for the very-fine results obtained in keeping with the fees and commissions customarily paid on the gross amounts collected.

There was no reason, in this case, for the attorney for the trustee to keep the time devoted by those in her collection department pursuing and effecting collections. She should be complimented, rather than criticized, because no one can gainsay that collecting more than twice the amount that bankrupt believed his accounts receivable were worth was not a good job, nor can anyone say that collecting three and one-half times the amount the Referee was originally disposed to approve a sale of the accounts receivable for does not show, on the part of the attorney for the trustee, the kind of results for which a reasonable fee should be fixed, not a parsimonious amount.

CONCLUSION

In conclusion, we ask: Is it not common knowledge that an experienced attorney for a trustee in bankruptcy, in most instances, is the one who is responsible for a successful operation of a business and for the sale of a business as a going concern and for the collecting and reducing of the assets of the bankrupt to money? Is it not expected that an experienced attorney for any trustee, but especially an inexperienced trustee, will perform such services? Is it not reasonable, here, to conclude that the successful operation of the business, the successful sale of the physical assets as a going concern, the smooth and successful administration of the estate in bankruptcy, and the success in the collection of accounts receivable must be credited to Appellant? It goes without dispute that Appellant, alone, must be credited with getting 4% interest on the funds of the estate deposited into the depository bank.

It is submitted, upon a fair consideration of this case, that the allowance of only $8,000.00 as a fee is so low as to amount to an abuse of discretion.

It is further respectfully submitted that the question of a reasonable fee should be referred back to the Referee for further consideration and the fixing of a reasonable fee, with the applicable law considered, in the light of the facts of the case; or, in the alternative, that this Court, upon the evidence before it, should direct the allowance to Appellant of the fee of $30,000.00 sought, or such an amount in ex-

cess of the $8,000.00 allowed and the $30,000.00 sought as this Court in its wisdom may deem to be a reasonable fee.

Dated, Phoenix, Arizona,
December 6, 1967.

Respectfully submitted,
STOCKTON & HING,
By HENDERSON STOCKTON,
Attorneys for Appellant
Beverly J. McConnell.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENDERSON STOCKTON.